Supreme Court U.S.
FEB 25 2005
OFFICE OF THE CLERK

(4)

No. 04-989

In the Supreme Court of the United States

SARAH JENKINS HORTON, *ET AL.*,

Petitioners,

v.

BANK ONE, N.A., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF WACHOVIA BANK, NATIONAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ROBERT W. FULLER III
STEPHEN M. COX
KATE G. MAYNARD
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
(704) 377-2536

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

QUESTION PRESENTED

Amicus will address the question whether the Court should consider the petition for a writ of certiorari in this case along with the forthcoming petition in *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICUS CURIAE* 1
ARGUMENT 2

TABLE OF AUTHORITIES

Page(s)

Cases

Firstar Bank v. Faul, 253 F.2d 982 (7th Cir. 2001) 3

Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414 (4th Cir. 2004) 1, 3, 4

Wachovia Bank, N.A. v. Schmidt, No. 03-2061 (Jan. 28, 2005) 1, 3

Statute and Rule

28 U.S.C. § 1348 ..... 1, 2

Fed. R. App. P. 35(a) 3

INTEREST OF THE *AMICUS CURIAE*

Amicus Wachovia Bank, National Association ("Wachovia") is a national banking association with its main office in Charlotte, North Carolina.[1] Wachovia operates branches in a number of other states, including South Carolina. In *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004), Wachovia filed a petition in the United States District Court for the District of South Carolina seeking an order to compel arbitration of a dispute with citizens of South Carolina. On appeal after denial of the petition, the Fourth Circuit ruled that, under 28 U.S.C. § 1348, national banks must be treated as citizens of *all* states in which they have branches. That court accordingly held that both Wachovia and the *Wachovia Bank* plaintiffs are citizens of South Carolina and that, as a result, the federal courts lack diversity jurisdiction to entertain the *Wachovia Bank* suit.

The question addressed in *Wachovia Bank* and in this case – whether national banks should be treated as citizens of all states in which they maintain a branch – is one of great practical importance to *amicus*. The resolution of that question will affect a substantial volume of litigation in which national banks like Wachovia engage. And, as Judge King observed while dissenting from denial of rehearing en banc in *Wachovia Bank*, the Fourth Circuit's rule will have substantial "disruptive consequences" for national banks by excluding them from federal court whenever they have a branch in the forum state. *Wachovia Bank, N.A.* v. *Schmidt*, No. 03-

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

2061 (Jan. 28, 2005), slip op. 6 (King, J., dissenting from denial of rehearing en banc). *Amicus* accordingly has a significant interest in the proper disposition of this petition, and of the petition for certiorari that Wachovia will soon file in *Wachovia Bank*. *Amicus* therefore submits this brief to assist the Court in the resolution of this petition.

ARGUMENT

The question presented by the petitioner in this case is whether, under 28 U.S.C. § 1348, a national bank should be treated for purposes of diversity jurisdiction as a citizen of *every* state in which it maintains a branch or, instead, as a citizen only of the state listed in its organizational certificate and articles of association or in which it has its *principal* place of business. *Amicus* Wachovia believes that this issue is an extremely significant one that should be resolved by this Court. The broader citizenship rule enunciated by the Fourth Circuit in *Wachovia Bank* will encourage forum shopping, while denying national banks competitive equality with state banks that are not governed by section 1348. For these reasons, the Comptroller of the Currency urged the Fourth Circuit to grant en banc review in *Wachovia Bank*, noting that the issue presented is one "of exceptional importance." No. 03-2061, Br. Amicus Curiae of the Office of the Comptroller of the Currency in Support of Plaintiff Wachovia Bank, N.A.'s Petition for Rehearing and Request for Rehearing En Banc, at 1. Wachovia will soon file a petition for a writ of certiorari in *Wachovia Bank*, which this Court may wish to consider along with the petition in this case.

1. In the present case, the Fifth Circuit concluded that the language of section 1348 is ambiguous; looking to the history and purpose of the statute, the court held that a national bank should be treated as a citizen only of the state in which it has its principal place of business and/or the state that is listed in its organizational certificate and articles of association. Pet.

App. 5a-19a. Less than a month later, however, the Fourth Circuit reached the contrary conclusion, holding in *Wachovia Bank* that a national bank is a citizen of every state in which it operates branches. *Wachovia Bank*, 388 F.3d at 416-440. In doing so, the Fourth Circuit expressly rejected the holding of the Fifth Circuit in this case and of the Seventh Circuit in *Firstar Bank* v. *Faul*, 253 F.2d 982 (7th Cir. 2001). Judge Luttig's opinion for the Fourth Circuit addressed the views of the disagreeing circuits and assessed the statutory language, history, and case law. Judge King responded with a lengthy and well-reasoned dissent. *Wachovia Bank*, 388 F.3d at 432-440 (King, J., dissenting).

When Wachovia sought rehearing en banc by the Fourth Circuit, a substantial majority of the participating judges *favored* the petition: six voted for rehearing, while only three voted against, with the remaining four recusing themselves. In this unusual circumstance, rehearing was denied because a majority of judges "in regular active service" did not support the petition. Fed. R. App. P. 35(a). See Fourth Cir. Local R. 35(b). This result prompted Judge King to issue a renewed dissent, in which he described the importance of the issue and emphasized the aberrant nature of the Fourth Circuit's decision. *Wachovia Bank, N.A.* v. *Schmidt*, No. 03-2061 (Jan. 28, 2005), slip op. 3-6 (King, J., dissenting from denial of rehearing en banc).

2. Against this background, *amicus* believes that the Court should resolve the issue presented here by granting review in *Wachovia Bank* or in this case, or by granting both petitions and consolidating the cases. The Court accordingly may wish to defer resolution of the petition in the present case pending the filing of the forthcoming petition for certiorari in *Wachovia Bank*. Having cases representing both sides of the conflict before the Court would permit the fullest presentation of the issues. We note that the Office of the Comptroller of the Currency has participated in both cases; it

submitted briefs supporting Bank One on the merits before the Fifth Circuit and supporting Wachovia's petition for rehearing before the Fourth Circuit.

Moreover, postponing resolution of the petition in this case so that it may be considered along with the petition in *Wachovia Bank* would not materially delay the resolution of this case. Although the petition in *Wachovia Bank* is not due until April 29, Wachovia will file its petition by no later than March 4. That will assure that the petitions in both cases could be resolved prior to the Court's recess this summer.

For the foregoing reasons, the Court should defer resolution of the petition in this case pending the filing of the forthcoming petition for certiorari arising out of *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004).

Respectfully submitted.

ROBERT W. FULLER III
STEPHEN M. COX
KATE G. MAYNARD
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
(704) 377-2536

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
EVAN M. TAGER
Mayer, Brown, Rowe & Maw, LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

FEBRUARY 2005